

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA

Plaintiff.

V.

ANDREW NOEL, and WAYNE JOHNSON.

Defendants

Case No. Cr07-5656

**ORDER DENYING
DEFENDANT NOEL'S
MOTION TO DISMISS FOR
LACK OF JURISDICTION**

This matter comes before the court on Defendant Noel's Motion to Dismiss for Lack of Jurisdiction. The court has considered all materials submitted in support of and in response to said motion as well as the files and records herein.

Defendant Noel's Motion to Dismiss for Lack of Jurisdiction is premised on the grounds that the "alleged offenses occurred within the Makah Indian Reservation and are thus within the exclusive jurisdiction of the Makah Tribe."

The Government responds alleging that (1) the statute charged in the Indictment, the Marine Mammal Protection Act (MMPA), is one of general application, applicable throughout the United States, both on and off of the reservations; (2) the Indictment's allegations are sufficient to charge the defendants with the offenses at issue; and (3) the motion raises factual questions not appropriate for resolution by a pre-trial motion.

1 For purposes of this motion the court assumes the facts alleged by the plaintiff to be
 2 accurate: (a) that defendant and others hunted a gray whale encountered in Neah Bay
 3 without a permit; (b) defendant struck the whale with one or more harpoons and shot it with
 4 a high caliber weapon within the area of the Makah Reservation where the discharge of
 5 firearms is prohibited; and (c) that thereafter the whale towed the defendant out into open
 6 waters outside the Makah Reservation. Defendant alleges that when a reservation is bounded
 7 by tidelands and waters, the reservation boundary is the “extreme low tide mark,” meaning
 8 the furthest area out into the sea which is ever uncovered by water, regardless of whether it is
 9 normally submerged by tides. Addressing the government’s responses to defendant Noel’s
 jurisdictional challenge in the order set forth, the court finds and concludes as follows:

10 1. **The MMPA** . The legislation subject of the alleged violations in this matter is the
 11 Marine Mammal Protection Act, 16 U.S.C. 1361-1361 et seq. It is a statute designed to be
 12 applied nationwide, United States v. Begay, 42 F.3d 486 (9th Cir. 1994). The statute applies
 13 to the defendants and the Makah reservation. Defendant cites by way of authority the Makah
 14 Treaty and its provision conferring whale hunting rights on the Makah reservation.
 15 Defendant acknowledges that the Treaty does not confer “exclusive” hunting rights, but
 16 contends they are implied and have been recognized by the court in United States v.
 17 Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 426 U.S. 1083 (1986). “Exclusivity”
 18 is not the issue in this case. Assuming the rights were exclusive does not trump defendant’s
 19 obligation to secure a permit. The Ninth Circuit Court of Appeals has already ruled that the
 20 Marine Mammal Protection Act (MMPA) applies to the whaling rights of the Makah.
 21 Anderson v. Evans, 371 F.2d 475. Therein the court stated:

22 . . . in holding that the MMPA applies to the Tribe, we need not and do not decide
 23 whether the Tribe’s whaling rights have been abrogated by the MMPA. We simply
 24 hold that the Tribe, to pursue any treaty rights for whaling, must comply with the
 25 process prescribed in the MMPA for authorizing a ‘take’ because it is the procedure
 26 that ensures the Tribe’s whaling will not frustrate the conservation goals of the
 27 MMPA.

28 2. **Sufficiency of Indictment.** The allegations in the Indictment do, as alleged by
 29 the government, if true, confer jurisdiction over the defendants.

30 3. **Makah Reservation Boundary.** To the extent the boundary is relevant to the
 31 specific charges in this case, defendant has not made a case that it defeats the jurisdiction of
 32

1 the United States to enforce the provisions of the Marine Mammal Protection Act.

2 **Defendant Noel's Motion to Dismiss for Lack of Jurisdiction is denied.**

3 Dated this 2nd day of April, 2008.

4 */s/ J. Kelley Arnold*
5 J. Kelley Arnold
6 U.S. Magistrate Judge